Parker LaFarge, Inc.
Employer Status Determination

This is the decision of the Railroad Retirement Board regarding the status of Parker LaFarge, Inc. (PLI), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

PLI acquired all of the voting stock of Western Rail Road Corporation (WRRC), an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts (B.A. Number 3850) on July 2, 1990. PLI was formerly known as Parker Materials, Inc.

The operations of PLI consist of a limestone quarry in New Braunfels, Texas, and five distribution terminals in Houston. PLI is expected to yield more than 40 million in annual sales. WRRC and PLI have three directors and two officers in common; PLI performs no services for WRRC or for any other railroad except preparation of WRRC's payroll; and PLI used WRRC for 43 percent of the shipping of PLI's products (the exact statement is "Of PLI's total shipments, approximately 43% utilized WRRC as the carrier of origin and other non-affiliated railroad companies as connecting and/or terminating carriers."). PLI has approximately 175 employees and WRRC has approximately 30 employees.

The definition of an employer contained in section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

> The term "employer" shall include--
>
> > (i) any express company, sleeping car company, and carrier by railroad, subject to [the Interstate Commerce Act];
> >
> > (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *.

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Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

There is no evidence that PLI is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether PLI is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it provides "service in connection with" railroad transportation and if it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer within section 1(a)(1)(ii).

Section 202.7 of the regulations (20 CFR 202.7) defines a service as in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations. While no court has expressly held payroll services to be a service in connection with railroad transportation, the court in Adams v. Railroad Retirement Board, 214 F.2d 534 (9th Cir. 1954), found accounting, purchasing, and stenographic services to be services in connection with railroad transportation. More recently, the court in Standard Office Building Corporation v. United States of America, 819 F 2d 1371, 1376 (7th Cir. 1987), recognized that service in connection with railroad transportation includes services that make it possible for the operating personnel to run trains as well as the operating services themselves. The Court in Standard Office Building stated that:

> the words "performs any service . . . in connection with [rail] transportation" were intended to exclude services unrelated to rail transportation, such as operating an amusement park open to the public on land owned by the railroad . . . Id., at 1376.

Payroll services are a support function, not unlike accounting services, and are "reasonably directly related, functionally [and] economically, to the performance of [rail carrier obligations]." 20 CFR 202.7. Accordingly, the Board concludes payroll services may constitute a service in connection with railroad transportation.

The evidence of record shows that PLI is engaged principally in quarrying, a non-rail-related activity. The only activity performed by PLI for its railroad subsidiary is the handling of WRRC's payroll. Section 202.6 of the regulations of the Board,

implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, quoted above, provides that:

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> The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is "casual" whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial. 20 CFR 202.6.

As noted above, the only service provided by PLI in connection with rail transportation is the preparation of the payroll for WRRC. PLI is engaged in quarry operations, which as noted above, generate in excess of $40 million in sales annually. Preparation of a payroll for WRRC, a company with 30 employees, would clearly constitute a negligible portion of the operations of PLI. On this basis, the Board concludes that the service in connection with rail transportation being performed by PLI for WRRC is casual, and, accordingly, the Board holds that PLI is not an employer under the Acts. Cf. Rev. Rul 84-91, 1984-1 C.B. 203, which held that the performance of services in connection with rail transportation was casual where the activities in question constituted less than 4% of the related company's activities.

PLI is, therefore, not an employer within section 1(a)(1)(ii), and the Board does not need to address the issue of whether PLI, the parent, is "under common control" with its subsidiary railroad.

It is the determination of a majority of the Board (Labor Member dissenting) that PLI is not an employer under the Acts.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever

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